Supreme Court, U.S.
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No. 92-1729

In The

Supreme Court of the United States

October Term, 1992

THEODORE THOMAS BOBURKA,

Petitioner,

v.

FRANK ADCOCK, M.D.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case at the District Court level involved allegations by the Plaintiff-Petitioner of medical malpractice by Dr. Adcock, the Defendant-Respondent. The District Court denied the doctor's Motion For A Directed Verdict and a jury verdict was returned against the doctor. On appeal, the United States Court of Appeals for the Sixth Circuit found as a matter of law that Dr. Adcock was entitled to a directed verdict. The appellate court reversed and remanded to the District Court for entry of judgment in favor of Dr. Adcock. The plaintiff's Petition to Rehear was denied by the Sixth Circuit. The plaintiff filed his Petition For A Writ Of Certiorari.

SUMMARY OF THE ARGUMENT

The Petition For Certiorari is premised upon a perceived misstatement of the law and the facts and therefore misstates the issues that would be before this Court if certiorari were granted. (Supreme Court Rule 15.1)

Contrary to the statements in the Petition, the Court of Appeals did not acknowledge that the "abuse of discretion" standard is the proper standard of review to use in deciding whether the trial court properly denied the defendant doctor's Motion for Directed Verdict.

Contrary to the Petition, the Sixth Circuit did not reverse "the verdict of the jury and the trial judge" nor

did the Sixth Circuit render "a verdict in favor of Adcock."

The written opinion of the Sixth Circuit (Appendix at pp. 1-37) states:

> (W)e shall review the district court's denial of Dr. Adcock's trial motion for directed verdict and his post-trial motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. (Appendix at p. 13)

Thus, the Sixth Circuit embarked upon consideration of three actions of the trial judge: (1) the district court's denial of Dr. Adcock's trial motion for directed verdict; (2) Dr. Adcock's post-trial motion for judgment notwithstanding the verdict; and, (3) Dr. Adcock's post-trial motion for a new trial. The appellate court found it necessary to review only the first of its three issues.

On the first page of the Sixth Circuit's opinion, that Court said:

> (W)e shall address only one [issue] because it is dispositive:
>
> > Whether there is sufficient competent evidence in the record to support the jury's finding of defendant's negligence, given the speculative nature of the testimony by the plaintiff's expert witness. Appendix at p. 2.

The Sixth Circuit went on to hold that the defendant's Motion For Directed Verdict should have been granted by the District Court. (Appendix at p. 37) The judgment for the plaintiff was set aside "because there is insufficient evidence on the issue of causation to support it." (Appendix at p. 3)

ARGUMENT

I

The Petition For Certiorari is premised upon a perceived misstatement of the law and the facts and therefore misstates the issues that would be before this Court if certiorari were granted. (Supreme Court Rule 15.1)

The Sixth Circuit reviewed the District Court's denial of Dr. Adcock's Trial Motion for a Directed Verdict. The standard applied for reviewing such Motion was whether there was sufficient evidence to raise a material issue of fact for the jury. The Court of Appeals found that there was a complete absence of pleading or proof on the issue of causation, an issue material to the plaintiff's cause of action, and set aside the judgment "because there is insufficient evidence on the issue of causation to support it." In conclusion, the Court of Appeals found that as a matter of law Dr. Adcock was entitled to a directed verdict. Consequently, the case was reversed and remanded for entry of a judgment for the defendant Adcock. (Appendix at p. 37)

As stated by the Court of Appeals, the standard for reviewing a motion for judgment notwithstanding the verdict or for directed verdict is a determination of "whether there was sufficient evidence to raise a material issue of fact for the jury (citation ommitted). The motion should be granted 'if there is a complete absence of pleading or proof on an issue or issues material to the cause of action.'" (Appendix at p. 13)

A review of a trial court's grant or denial of a motion for *new trial* (as distinguished from a motion for directed verdict) is based upon an abuse of discretion which is

defined as a "definite and firm conviction that the trial court committed a clear error of judgment (citation ommitted)." (Appendix at p. 14)

The Court of Appeals never reached the questions of whether Dr. Adcock's post-trial Motion for Judgment Notwithstanding the Verdict or whether his post-trial Motion for a New Trial should have been granted because it found that the Motion for Directed Verdict should have been granted during the trial. That motion should have been granted by the trial judge because there was insufficient proof to demonstrate that it was more likely than not that Dr. Adcock's negligence caused increased damage to Mr. Boburka's heart. The appellate court concluded as a matter of law that Dr. Adcock was entitled to a directed verdict. (Appendix at p. 37)

II

The Sixth Circuit's opinion is not in conflict with other decisions of other United States courts of appeals on the same matter. There is no federal question involved in this diversity-of-citizenship tort action based upon Tennessee state law.

The plaintiff based his contention that there was proof of causation upon Dr. Tew's testimony that the plaintiff would have had a "significant chance" of avoiding increased heart injury if he had been hospitalized by Dr. Adcock.

The Court of Appeals reviewed the Tennessee law to determine whether Tennessee permitted recovery for loss of a "significant chance," or, if Tennessee followed the traditional view that recovery was permitted only for

injuries that were "more likely than not" caused by the physician's negligence. The Sixth Circuit concluded that the Tennessee Supreme Court had rejected the theory of "loss of a significant chance" as being sufficient for recovery and held that a "review of Tennessee authority leaves us with the impression that Tennessee has not affirmatively adopted the loss of chance doctrine." (Appendix at p. 35) Consequently, "Dr. Tew's testimony, that if Dr. Adcock had hospitalized Boburka on August 18 Boburka would have had a 'significant chance' of reduced heart injury, is insufficient." (Appendix at p. 36) The Sixth Circuit concluded, as a matter of law "under the traditional principles, Dr. Tew's testimony, which was the only significant evidence on the issue of causation, was insufficient to demonstrate that it was more likely than not that Dr. Adcock's negligence caused the increased damage to Boburka's heart. We conclude, as a matter of law, that it was not, and that Dr. Adcock was entitled to a directed verdict." (Appendix at p. 37)

Petitioner makes much of the fact that in footnote 3 of its opinion, the Sixth Circuit stated that "we are somewhat troubled" because inconsistent dicta appeared in an unpublished opinion of the Tennessee Court of Appeals (*Kilpatrick v. Bryant*, No. 53, 1990 Tenn. App. Lexis 785 (Tenn Ct. App. Nov. 1, 1990)). However, the Sixth Circuit opinion dismissed the dicta in the *Kilpatrick* case by holding

> In any event, the result in *Kilpatrick* accords with traditional principles of proximate cause. The Court considered testimony 'based on a reasonable degree of medical certainty, that the delay of four (4) months in the operation performed

> increased the likelihood of (plaintiff) suffering irreparable damage.' *Id.* at 3. The court held that this testimony did 'not rise to the level required by the statute and fail(ed) to establish that the plaintiff 'suffered injuries which would not otherwise have occurred' due to the defendant's negligence. (Appendix at pp. 34-35 n.3)

Although the Sixth Circuit mentioned possible inconsistencies in the discussion, the holding in *Kilpatrick* is in conformance with the traditional view and supported the conclusion of the Sixth Circuit Court of Appeals in determining the status of the Tennessee law.

Finally, the petitioner complains that the Sixth Circuit failed to follow established state law and cites lay testimony on the question of causation in support of the assertion that there was material evidence of causation. However, Tennessee law requires expert testimony as to causation. As pointed out by the Court of Appeals,

> "even after *Truan*,* a plaintiff, under Tennessee law, must introduce proof that it is more likely than not that absent the physician's malpractice, the patient would not have suffered the complained of damages. Dr. Tew's testimony, that if Dr. Adcock had hospitalized Boburka on August 18, Boburka would have had a "significant chance" of reduced heart injury, is insufficient.
>
> We conclude that Tennessee has not adopted the loss of chance theory of proximate cause in medical malpractice cases but instead continues to follow traditional proximate cause principles. Under the traditional principles, Dr. Tew's testimony, which was the only significant evidence

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*_Truan v. Smith_, 578 S.W.2d 73 (Tenn. 1979).

> on the issue of causation, was insufficient to demonstrate that it was more likely than not that Dr. Adcock's negligence caused the increased damage to Boburka's heart. (Appendix at pp. 36-37)

Therefore, since there was no expert testimony to support petitioner's theory of causation, the Court of Appeals concluded that the defendant's Motion for Directed Verdict made during the trial should have been granted because there was no evidence of causation to submit to the jury.

CONCLUSION

This Court should not grant the Petition for Writ of Certiorari. The Court of Appeals based its holding upon only the issue of whether there was sufficient evidence under Tennessee law to support the jury's finding of defendant's negligence, given the speculative nature of the testimony of the plaintiff's expert witness. Following Tennessee law, the appellate court ruled that the trial court should have granted respondent's Motion for Directed Verdict.

Respectfully submitted,

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